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IN THE SUPREME COURT OF THE STATE OF NEVADA

FRANK P. SILVER, M.D.; and FRANK P.
SILVER, M.D., a Professional Corporation

Petitioners,

vs.

THE EIGHTH JUDICIAL DISTRICT COURT
OF THE STATE OF NEVADA ex rel. THE
COUNTY OF CLARK, AND THE
HONORABLE JUDGE KATHY A.
HARDCASTLE,

Respondent.

CECELIA DIAZ, As Special Administratrix of
the Estate of STEPHANIE T. BROCK,
Deceased; KERRY D. BROCK, SR.,
Individually, and as heir of the Estate of
STEPHANIE T. BROCK, Deceased; KERRY D.
BROCK, SR., as parent and natural guardian of
KERRY DEWAYNE BROCK, JR., a minor,
Individually and as heir to the Estate of
STEPHANIE T. BROCK, Deceased; KERRY D.
BROCK, as parent and natural guardian of
MAHOGANY THERESE CHALIZE BIAS, a
minor, Individually and as heir to the Estate of
STEPHANIE T. BROCK, Deceased,

Real Parties in Interest.

SUP CT CASE NO.:

DIST. CT CASE NO.:

A531625

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Tracie K. Lindeman
Clerk of Supreme Court

**EMERGENCY MOTION UNDER
NRAP 27(e)**

**ACTION REQUIRED BY APRIL 2,
2012**

**PETITION FOR WRIT OF MANDAMUS; MEMORANDUM OF POINTS
AND AUTHORITIES; SUPPORTING EXHIBITS**

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and Frank P. Silver, M.D., a Professional Corporation

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EMERGENCY PETITION FOR WRIT OF MANDAMUS

Petitioners, Frank P. Silver, M.D. and Frank P. Silver, M.D., a Professional Corporation, by and through their counsel of record, John H. Cotton, Esq. and John J. Savage, Esq., of the law firm of John H. Cotton and Associates, hereby respectfully petition this Court for an Emergency Writ of Mandamus pursuant to NRAP §§ 21 and 27(e), as well as this Court's original jurisdiction set forth in Article 6 § 4 of the Nevada Constitution, and NRS §§ 34.160 and 34.320. Petitioners, by and through counsel of record, provide the Court the following in support of this verified Petition:

1. Petitioners are Defendants in the case of *Cecelia Diaz, As Special Administratrix of the Estate of Stephanie T. Brock, Deceased; Kerry D. Brock, Sr., Individually, and as heir of the Estate of Stephanie T. Brock, Deceased; Kerry D. Brock, Sr., as parent and natural guardian of Kerry Dewayne Brock, Jr., a minor, Individually and as heir to the Estate of Stephanie T. Brock, Deceased; Kerry D. Brock, as parent and natural guardian of Mahogany Therese Chalize Bias, a minor, Individually and as heir to the Estate of Stephanie T. Brock, Deceased, vs. Frank P. Silver, M.D.; Frank P. Silver, M.D., a Professional Corporation; Does I-XX; and Roe Corporations I-XX, inclusive, (A531625). See Plaintiffs' Complaint, attached hereto as Exhibit 1.*

2. This action arises out of a claim of medical malpractice, against Frank Silver, M.D., and concerns the care and treatment rendered to Stephanie T.

1 Brock, deceased. *See id.*

2 3. The decedent died on June 19, 2005 following a laparoscopic lysis
3 of adhesions and drainage of right ovarian cyst (hereinafter "laparoscopic
4 procedure") that Dr. Silver performed on June 17, 2005. *Id. at 3:6-28.*

5 4. On or before June 21, 2005, the decedent's autopsy was requested.
6
7 *See Plaintiff Kerry Brock, Sr. 's Answers to Defendants' First Set of Interrogatories*
8 *for the Purpose of Limited Discovery at 4:25 – 5:4, attached hereto as Exhibit 2.*

9 5. The decedent's autopsy was performed on June 21, 2005. *See*
10 *Decedent's Autopsy Report, attached hereto as Exhibit 3.*

11 6. Kerry Brock, Sr. received and reviewed the autopsy report within one
12 to two days after its completion. *See Exhibit 2 at 5:5-11.*

13 7. The autopsy report listed the decedent's cause of death as fibrinous
14 peritonitis due to perforation of the sigmoid colon. *See Exhibit 3.*

15 8. Dr. Silver received a letter from Leann McNicholas, an attorney with
16 the law firm of Hardy Hardy & McNicholas, on July 13, 2005, which stated that
17 Hardy Hardy & McNicholas had been retained to represent the Estate of Stephanie
18 Brock. *See Letter Dated July 13, 2005, attached hereto as Exhibit 4.*

19 9. Kerry Brock, Sr. visited Hardy Hardy & McNicholas for information
20 concerning the decedent's death. *See Transcript from Kerry Brock, Sr. 's Limited*
21 *Deposition on June 4, 2007 at 5:8-18, attached hereto as Exhibit 5.*

22 10. At the time Kerry Brock, Sr. visited Hardy Hardy & McNicholas, he
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1 believed that something had gone wrong with the decedent's laparoscopic
2 procedure. *See Exhibit 5 at 7:18-22.*

3 11. Plaintiffs filed their Complaint on November 16, 2006, more than one
4 year after retaining attorneys to pursue this lawsuit. *See Exhibit 1.*

5 12. As will be explained further in the statement of facts below, the
6 decedent's mother, sister, and aunt all testified that they believed the decedent's
7 death had been caused by her laparoscopic procedure and that Kerry Brock, Sr. told
8 them that he also believed the decedent's death had been caused by her laparoscopic
9 procedure. *See Brenda Bias' Deposition Transcript at 29:15-17, 31:21 – 32:17,*
10 *33:20-23, 34:13 – 35:3, 35:20-24, 39:3-19 attached hereto as Exhibit 6; Jean*
11 *Walker's Deposition Transcript at 17:19-25, 18:17 – 19:2, attached hereto as*
12 *Exhibit 7; Ikea Bias' Deposition Transcript at 10:16-17; 26:10 – 27:13; 27:17 –*
13 *29:4, 32:1-8, 33:1-6, 34:3-13 attached hereto as Exhibit 8.*

14 13. The decedent's aunt, Jean Walker, is a retired registered nurse and she
15 assisted Kerry D. Brock, Sr. in retaining an attorney to pursue this lawsuit after
16 explaining to the decedent's family at a family meeting (including Kerry D. Brock,
17 Sr.), approximately two weeks after receiving the decedent's autopsy report – which
18 is dated June 21, 2005, that the decedent's autopsy confirmed her death had been
19 caused by her laparoscopic procedure. *See Exhibit 7 at 9:13-18; 19:20 – 20:18,*
20 *20:20 – 21:5; 21:11 – 22:2; 22:17 – 24:1; 24:8-11; 24:20 – 25: 4-10; 26:2-11;*
21 *27:10-12. See also Exhibit 6 at 36:18-25, 38:1-21.*

1 14. Based on the foregoing evidence, which indicates that Plaintiffs filed
2 their Complaint more than one year after being put on inquiry notice of their
3 possible claim, Petitioners filed a motion for summary judgment pursuant NRS
4 41A.097. *See Petitioners' Motion for Summary Judgment, attached hereto as*
5 *Exhibit 9.*
6

7 15. Despite finding that Plaintiffs were on inquiry notice prior to
8 receiving their expert's affidavit, the District Court denied Petitioners' motion for
9 summary judgment on the grounds that there remained a genuine factual issue
10 regarding the timing of Plaintiffs' actual knowledge of negligence (i.e. actual
11 notice). *See October 5, 2011 Hearing Transcript at 5:9-12, attached hereto as*
12 *Exhibit 10; District Court's Minute Order Denying Summary Judgment, attached*
13 *hereto as Exhibit 11.*
14

15 16. Real Parties in Interest are: Cecelia Diaz, As Special Administratrix
16 of the Estate of Stephanie T. Brock, Deceased; Kerry D. Brock, Sr., Individually,
17 and as heir of the Estate of Stephanie T. Brock, Deceased; Kerry D. Brock, Sr., as
18 parent and natural guardian of Kerry Dewayne Brock, Jr., a minor, Individually and
19 as heir to the Estate of Stephanie T. Brock, Deceased; Kerry D. Brock, as parent and
20 natural guardian of Mahogany Therese Chalize Bias, a minor, Individually and as
21 heir to the Estate of Stephanie T. Brock, Deceased, represented by Ralph A.
22 Schwartz, Esq. of the law firm of Ralph A. Schwartz, P.C.
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26 17. The District Court manifestly abused its discretion by failing to grant
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Petitioners' motion for summary judgment due to the fact that the one year statute of limitations had run and that the District Court applied an actual notice standard rather than NRS 41A.097's requisite inquiry notice standard.

18. This manifest abuse of discretion will result in unwarranted harm to Petitioners as they are now forced to expend time and litigation expenses to continue onto trial with the medical malpractice claims intact. Such an error of law calls for this Court to issue a Writ of Mandamus to prevent Petitioners from incurring exorbitant and unwarranted legal fees to continue onto trial with the medical malpractice claims intact as the statute of limitations has clearly run on those claims. There is no adequate, speedy remedy available to Petitioners to address these problems.

19. This manifest abuse of discretion is contrary to this Court's rulings regarding notice of legal injury for purposes of NRS 41A.097.

20. Due to the unique circumstances and set of facts present in this particular case, review of this Petition will allow this Court to clarify a highly important issue of law that continues to appear in medical malpractice cases before the Eighth Judicial District Court. That issue is when NRS 41A.097's one year statute of limitations begins to run. A full published opinion on this issue is necessary at this point in medical malpractice jurisprudence to avoid having to defend cases that are obviously filed outside of the statute of limitations.

21. The circumstances of this matter are urgent because trial has recently

1 been reset to begin on April 2, 2012 and Petitioners would be forced to expend
2 unwarranted legal fees at trial if this matter was heard in the normal appellate
3 course.

4
5 **WHEREFORE**, based on the foregoing and the accompanying Points and
6 Authorities, Petitioners respectfully request this Court to issue a Writ ordering the
7 Respondent to grant Petitioners' motion for summary judgment and dismiss
8 Plaintiffs' Complaint.

9
10 DATED this 9th day of February 2012.

11 **JOHN H. COTTON & ASSOCIATES, LTD.**
12 2300 W. Sahara Avenue, Ste. 420
13 Las Vegas, Nevada 89102

14 
15 John H. Cotton, Esq.

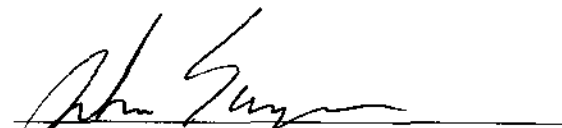
16 John J. Savage, Esq.
17 *Attorneys for Petitioners*
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VERIFICATION


Under penalty of perjury, the undersigned declares that he is the attorney for Petitioners named in the foregoing petition and knows the contents thereof; that the pleading is true of his own knowledge, except as to those matters stated on information and belief, and that as such matters he believes to be true. This verification is made by the undersigned attorney pursuant to NRS 15.010, on the ground that the matters stated, and relied upon, in the foregoing petition are all contained in the prior pleadings and other records of the District Court, true and correct copies of which have been attached hereto.

Executed this 9th day of February 2012.


John J. Savage, Esq.

SUBSCRIBED AND SWORN to before me

this 9th day of February 2012


NOTARY PUBLIC in and
for said County and State



MEMORANDUM OF POINTS AND AUTHORITIES

I. PROCEDURAL HISTORY

This action arises out of a claim of medical malpractice, against Frank Silver, M.D., and concerns the care and treatment rendered to Stephanie T. Brock, deceased. *See Plaintiffs' Complaint, attached hereto as Exhibit 1.* The decedent died on June 19, 2005 following a laparoscopic lysis of adhesions and drainage of right ovarian cyst (hereinafter "laparoscopic procedure") that Dr. Silver performed on June 17, 2005. *Id. at 3:6-28.* However, Plaintiffs' Complaint was not filed until November 16, 2006. *Id.* Plaintiffs' Complaint alleges that Dr. Silver perforated the decedent's sigmoid colon during the laparoscopic procedure, and consequently, caused her death. *Id. at 4:21 - 5:5 and Michael L. Friedman, M.D.'s expert affidavit.*

The facts here indicate that Plaintiffs' statute of limitations expired before Plaintiffs filed their Complaint on November 16, 2006. Accordingly, Petitioners initially filed a Motion to Dismiss Plaintiffs' Complaint in lieu of an Answer on December 15, 2006. *See Register of Actions, attached hereto as Exhibit 12.* The District Court heard oral argument on March 6, 2007 and granted sixty days limited discovery in order to delve into the issue of when Plaintiffs' cause of action accrued for the purposes of the statute of limitations and discovery rule. *Id.* The District Court heard oral argument again on June 26, 2007 regarding the outcome of limited discovery and granted Petitioners' motion based on expiration

1 of the one year statute of limitations in NRS 41A.097(2). *See District Court's*
2 *Motion to Dismiss Order, attached hereto as Exhibit 13.*

3 Plaintiffs appealed the District Court's dismissal and this Court found in
4 Plaintiffs' favor, holding that there was a genuine issue of material fact regarding
5 the timing of Plaintiffs' knowledge of legal injury. *See Nevada Supreme Court's*
6 *Order, attached hereto as Exhibit 14.* As a result, the instant matter was remanded
7 back to this Court on July 23, 2008.¹ *Id.* Plaintiffs moved to have the instant
8 matter placed on the Court's calendar in light of the Nevada Supreme Court's order
9 and the Court granted Plaintiffs' motion on April 21, 2009. *See Exhibit 12.*

12 Petitioners acknowledge and respect this Court's previous finding that, at
13 the time the District Court heard oral argument on June 26, 2007, a genuine issue
14 of material fact remained regarding the timing of Plaintiffs' knowledge of legal
15 injury. However, this finding was made with respect to Petitioners' initial
16 responsive pleading. Petitioners had only conducted sixty (60) days of limited
17 discovery at that time. Nearly two years of discovery has since been conducted.
18 The recent deposition testimonies of Brenda Bias, Jean Walker, and Ikea Bias
19 have clarified important facts that Plaintiff Kerry Brock, Sr. was unable to recall
20 during his limited deposition on June 4, 2007. These newly discovered facts
21 established that Plaintiffs were on inquiry notice of their possible cause of action
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23
24
25 ¹ Petitioners unsuccessfully petitioned for rehearing on August 7, 2008 and for en
26 banc reconsideration on November 17, 2008. This Court denied these petitions on
27 November 7, 2008 and January 8, 2009, respectively.

1 more than one year before they filed their Complaint.

2 **II. STATEMENT OF FACTS**

3 This action arises out of a claim of medical malpractice, against Frank
4 Silver, M.D., and concerns the care and treatment rendered to Stephanie T. Brock,
5 deceased. *See Exhibit 1.* The decedent died on June 19, 2005 following a
6 laparoscopic lysis of adhesions and drainage of right ovarian cyst (hereinafter
7 "laparoscopic procedure") that Dr. Silver performed on June 17, 2005. *Id. at*
8 *3:6-28.*

9
10
11 On or before June 21, 2005, the decedent's autopsy was requested. *See*
12 *Exhibit 2 at 4:25 – 5:4.* The decedent's autopsy was performed on June 21, 2005.
13 *See Exhibit 3.* Kerry Brock, Sr. received and reviewed the autopsy report within
14 one to two days after its completion. *See Exhibit 2 at 5:5-11.* The autopsy report
15 listed the decedent's cause of death as fibrinous peritonitis due to perforation of the
16 sigmoid colon. *See Exhibit 3.*

17
18 On July 13, 2005, Dr. Silver received a letter from Leann McNicholas, an
19 attorney with the law firm of Hardy Hardy & McNicholas, which stated that Hardy
20 Hardy & McNicholas had been retained to represent the Estate of Stephanie Brock.
21 *See Exhibit 4.* Kerry Brock, Sr. visited Hardy Hardy & McNicholas for
22 information concerning the decedent's death. *See Exhibit 5 at 5:8-18.* At the
23 time Kerry Brock, Sr. visited Hardy Hardy & McNicholas, he believed that
24 something had gone wrong with the decedent's laparoscopic procedure. *Id. at*
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7:18-22.

Plaintiffs filed their Complaint on November 16, 2006, more than one year after retaining attorneys to pursue this lawsuit. *See Exhibit 1*. After this Court remanded the instant case back to the District Court, Petitioners discovered additional facts that established Plaintiffs were on inquiry notice of their possible cause of action more than one year before they filed their Complaint.

The decedent's mother, Brenda Bias, testified that, as of June 19, 2005 (the day that the decedent died) she believed the decedent's death had been caused by something that went wrong during the decedent's laparoscopic procedure. *See Exhibit 6 at 31:21 – 32:17*. She believed that the decedent's death had been caused by something that went wrong during the decedent's laparoscopic procedure because she was told that the decedent died from heart failure, but the decedent was not sick before her laparoscopic procedure and she did not have any heart problems. *Id. at 29:15-17, 33:20-23*. Brenda Bias also testified that, within a few days of the decedent's passing, Kerry Brock, Sr. told her he also thought the decedent's death had been caused by something that went wrong during the decedent's laparoscopic procedure. *See id. at 34:13 – 35:3*.

The decedent's aunt, Jean Walker, is a retired registered nurse. *See Exhibit 7 at 9:13-18*. Jean Walker testified that she personally ordered the decedent's autopsy – which was performed on or before June 21, 2005 – because she also thought the decedent's death had been caused by something that went wrong during

1 the decedent's laparoscopic procedure. *See Exhibit 6 at 35:20-24 and Exhibit 7 at*
2 *18:25 – 19:2. See also Exhibit 3.*

3 Before Jean Walker ordered the decedent's autopsy, she had questions about
4 the cause of the decedent's death because the decedent was only thirty (30)
5 years-old and did not have any other medical problems so "red flags just went up."
6 *See Exhibit 7 at 17:19-25.* She did not believe that the decedent could have
7 suffered a heart attack at age thirty (30) without any other problems. *Id. at*
8 *18:17-24.*

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10
11 Approximately two weeks after receiving the decedent's autopsy report –
12 which is dated June 21, 2005 – Jean Walker explained the decedent's autopsy report
13 to her family, including Kerry Brock, Sr., at a family meeting, which Kerry Brock,
14 Sr. attended. *See Exhibit 7 at 20:2-18, 21:11 – 22:2. See also Exhibit 3.* She
15 explained to her family that the decedent's autopsy report showed that the
16 decedent's death was caused by a perforated bowel and that there was nothing
17 wrong with the decedent's heart. *See Exhibit 7 at 24:20 – 25:3.*

18
19
20 Brenda Bias recalled Jean Walker telling her that the decedent's autopsy
21 results showed that Dr. Silver lasered the decedent, cut her bowels, and poisoned
22 her system. *See Exhibit 6 at 36:18-25.* She also recalled Jean Walker telling her
23 that the decedent's autopsy results confirmed that the cause of the decedent's death
24 was related to her laparoscopic procedure. *See id. at 38:1-21.*

25
26 Jean Walker recalled the decedent's autopsy listing perforated bowel as her
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1 cause of death, which validated her suspicions that something had happened during
2 the decedent's laparoscopic procedure. *See Exhibit 7 at 19:20 – 20:1.* Based on
3 her medical training, Jean Walker believed that the decedent's bowel was perforated
4 during her laparoscopic procedure. *See id. at 25:4-10.*

5
6 Jean Walker further testified that their family meeting about the decedent's
7 autopsy report in late June/early July 2005 resulted in a decision to pursue litigation.
8 *See id. 20:20 – 21:5.* Likewise, Brenda Bias testified that Kerry Brock, Sr. told
9 her, approximately a few days after the decedent's death, he was getting an attorney
10 because he thought something had gone wrong during the surgery that caused the
11 decedent's death. *See Exhibit 6 at 39:3-19.*

12
13 Sometime before July 13, 2005, Jean Walker looked in the phonebook for an
14 attorney to take their case. *See Exhibit 7 at 22:17-21. See also Exhibit 4.*
15 Sometime before July 13, 2005, Jean Walker's niece-in-law, Michelle Board, went
16 online to look for an attorney and gave Jean Walker the name of the law firm Hardy
17 Hardy & McNicholas. *See Exhibit 7 at 22:22 – 23:5. See also Exhibit 4.* Also,
18 sometime on or before July 13, 2005, Jean Walker went with Kerry Brock, Sr. to
19 Hardy Hardy & McNicholas and they personally met with a female attorney. *See*
20 *Exhibit 7 at 23:6 – 24:1. See also Exhibit 4.* The purpose of meeting with the
21 attorney from Hardy Hardy & McNicholas was to pursue a lawsuit based on the
22 decedent's death as it related to her laparoscopic procedure. *See Exhibit 7 at*
23 *24:8-11.*

1 Within one or two weeks after the decedent's funeral, Jean Walker had gone
2 with Kerry Brock, Sr. to Valley Hospital and Lake Mead Hospital to request the
3 decedent's medical records. *See id. at 26:2-11.* Jean Walker thinks they had
4 these records available when they met with the attorney from Hardy Hardy &
5 McNicholas. *See id. at 27:10-12.* She also testified that the attorneys from Hardy
6 Hardy & McNicholas referred them to Plaintiffs' current counsel due to "some sort
7 of conflict of interest or something." *See id. at 22:23 - 23:1, 24:2-7.*

8
9 The decedent's youngest sister, Ikea Bias, also testified that she immediately
10 believed the decedent's death had been caused by something that went wrong
11 during the decedent's laparoscopic procedure because the decedent was fine before
12 surgery. Specifically, Ikea Bias said that "[i]t was from her surgery, so yeah,
13 common sense, you know" and that she blamed Dr. Silver for the decedent's death
14 because "she wasn't like this until after he did this procedure on her." *See Ikea*
15 *Bias' Deposition Transcript at 26:10 - 27:13, attached hereto as Exhibit 8.* Ikea
16 Bias knew the decedent was healthy before the surgery because she had been living
17 with the decedent. *See id. at 10:16-17.*

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19
20 At or around the time of the decedent's death on June 19, 2005, Kerry Brock,
21 Sr. told Ikea Bias that he believed Dr. Silver's surgery caused the decedent's death.
22 *See id. at 27:17 - 29:4, 32:1-8.* At or around the time of the decedent's autopsy
23 results on June 21, 2005, Kerry Brock, Sr. also told Ikea Bias that the decedent's
24 autopsy report showed the decedent's bowel was nipped. *See id. at 33:1-6.* Ikea
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1 Bias believed the decedent's autopsy results confirmed that Dr. Silver's surgery
2 caused the decedent's death. *See id. at 34:3-13.*

3 **III. ISSUES PRESENTED**

4
5 Whether the District Court erred in denying Petitioners' motion for summary
6 judgment on the grounds that there remained a genuine factual issue regarding the
7 timing of Plaintiffs' actual knowledge of negligence where:

- 8
9 (1) it is well settled that, under NRS 41A.097, "the statute of limitations
10 begins to run when the patient has before him facts which would put a
11 reasonable person on **inquiry notice** of his **possible cause of action**,
12 whether or not it has occurred to the particular patient to seek further
13 medical advice;
- 14 (2) "[t]he focus is on the patient's knowledge of or access to facts rather
15 than on her discovery of legal theories;" and
- 16 (3) suspicion of negligence is enough to constitute inquiry notice of a
17 legal injury.

18 Whether Plaintiffs were on inquiry notice of their possible cause of action
19 more than one year before they filed their Complaint when:

- 20 (1) the decedent died two days following her laparoscopic procedure
21 without any other pre-existing medical conditions;
- 22 (2) the decedent's autopsy report listed the decedent's cause of death as
23 fibrinous peritonitis due to perforation of the sigmoid colon;
- 24 (3) the decedent's family believed the decedent's death was caused by
25 her laparoscopic procedure at or around the time of her death;
- 26 (4) Kerry Brock, Sr. told the decedent's family that he also believed the
27 decedent's death was caused by her laparoscopic procedure at or
28 around the time of her death;

- (5) the decedent's aunt, who is a retired registered nurse, and explaining to the decedent's family at a family meeting in late June/early July 2005 (including Kerry D. Brock, Sr.) that the decedent's autopsy confirmed her death had been caused by her laparoscopic procedure;
- (6) the family meeting about the decedent's autopsy report resulted in a decision to pursue litigation;
- (7) the decedent's family believed the decedent's autopsy results confirmed her death was caused by her laparoscopic procedure;
- (8) Kerry Brock, Sr. told the decedent's family that he also believed the decedent's autopsy results confirmed her death was caused by her laparoscopic procedure;
- (9) Sometime before July 13, 2005, Kerry Brock, Sr. retained Hardy Hardy & McNicholas to pursue this lawsuit;
- (11) Hardy Hardy & McNicholas referred Plaintiffs to their current counsel due to an undisclosed conflict of interest; and
- (12) Plaintiffs filed their Complaint on November 16, 2006, more than one year after retaining attorneys to pursue this lawsuit.

IV. STATEMENT OF REASONS WHY THIS COURT SHOULD ISSUE A WRIT OF MANDAMUS

A. Writ of Mandamus Standard

A writ of mandamus is an extraordinary remedy by this Court available (1) "to compel the performance of an act which the law requires as a duty resulting from an office, trust or station"; (2) "to control a manifest abuse of or arbitrary or capricious exercise of discretion"; or (3) "to clarify an important issue of law." Bennett v. Eighth Judicial Dist. Court, 121 Nev.Adv.Rep. 78, ___, 121 P.3d 605, 608 (2005) (internal quotation marks and citations omitted). The decision whether

1 to issue a writ lies within this Court's discretion, where the Court "considers the
2 interests of judicial economy and sound judicial administration." Id. (citing State
3 v. Eighth Judicial Dist. Ct. (Riker), 121 Nev. ___, 112 P.3d 1070, 1074 (2005)).
4
5 "[A] writ will not be issued by this court 'where the petitioner has a plain, speedy,
6 and adequate remedy in the ordinary course of law.'" Id. (quoting Riker, 121 Nev. at
7 ___, 112 P.3d at 1074)).

8
9 In the instant case, the District Court committed manifest abuse of discretion
10 when it denied Petitioners' motion for summary judgment. Such an error of law
11 calls for this Court to issue a Writ of Mandamus to prevent Petitioners from
12 incurring exorbitant and unwarranted legal fees to continue onto trial with the
13 medical malpractice claims intact as the statute of limitations has clearly run on
14 those claims. There is no adequate, speedy remedy available to Petitioners to
15 address these problems.
16

17 Due to the unique circumstances and set of facts present in this particular
18 case, review of this Petition will allow this Court to clarify a highly important issue
19 of law that continues to appear in medical malpractice cases before the Eighth
20 Judicial District Court. That issue is when NRS 41A.097's one year medical
21 malpractice statute of limitations begins to run as a matter of law.
22

23 A full published opinion on this issue is necessary at this point in medical
24 malpractice jurisprudence to avoid having to defend cases that are obviously filed
25 outside of the statute of limitations.
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1 **B. Respondent Manifestly Abused Its Discretion When It Denied**
2 **Petitioners' Motion for Summary Judgment on the Grounds that**
3 **there Remained a Genuine Factual Issue Regarding the Timing**
4 **of Plaintiffs' Actual Knowledge of Negligence**

5 By finding an issue regarding the timing of Plaintiffs' actual knowledge of
6 negligence, the District Court applied an actual notice standard. This was a
7 manifest abuse of the District Court's discretion. Actual notice of a definite cause
8 of action is not required to trigger NRS 41A.097's one-year statute of limitations,
9 only inquiry notice is required.

10 "An action for injury or death against a provider of health care may not be
11 commenced more than 3 years after the date of injury or 1 year after the plaintiff
12 discovers or through the use of reasonable diligence should have discovered the
13 injury, whichever occurs first." NRS 41A.097. The term "injury" in NRS
14 41A.097 refers to a legal injury, which requires not only the discovery of the
15 medical condition but also the apprehension that the medical condition was caused
16 by a health care provider's negligence. Massey v. Litton, 99 Nev. 723, 726-27, 669
17 P.2d 248, 251 (1983).

18 Accordingly, under NRS 41A.097, "the statute of limitations begins to run
19 when the patient has before him facts which would put a reasonable person on
20 **inquiry notice** of his **possible cause of action**, whether or not it has occurred to the
21 particular patient to seek further medical advice." Id. at 728-29 (emphasis added).
22 "The focus is on the patient's knowledge of or access to facts rather than on her
23 24 25 26 27 28

discovery of legal theories.” Id. at 728 (emphasis added).

Inquiry notice is markedly distinguishable from actual notice. Suspicion of negligence is enough to constitute inquiry notice of a legal injury. Massey, 99 Nev. at 728 (reversing summary judgment because the appellant’s discovery of *symptoms* of dropped foot did not necessarily mean that she had discovered negligence, or that she had cause to suspect negligence) (italics in original, emphasis added in bold).² “By contrast, **actual notice** means that which a person **actually knows....**” Perry v. O’Donnell, 749 F.2d 1346, 1351 (9th Cir. Cal 1984) (emphasis added).

Furthermore, requiring actual knowledge of a legal injury rather than allowing inquiry notice to trigger a plaintiff’s statute of limitations would render the “should have discovered” provision in NRS 41A.097 meaningless. “Where a statute is ambiguous, this court must construe its provisions to give meaning to all of the language and should read each sentence, phrase, and word to render it meaningful within the context of the purpose of the legislation.” Runion v. State, 116 Nev. 1041, 13 P.3d 52, 56 (2000). Correspondingly, it was also a manifest abuse of discretion for the District Court to interpret NRS 41A.097 in a way that

² See also Whitlock v. Pepsi Americas, 2009 U.S. Dist. LEXIS 97476 at 10 (N.D. Cal 2009) (defining inquiry notice as “reason to suspect a factual basis for a cause of action, rather than actual knowledge thereof”); Jolly v. Eli Lilly & Co., 44 Cal.3d 1103, 1111 (1988) (holding that “[o]nce the plaintiff has a suspicion of wrongdoing, and therefore an incentive to sue, she must decide whether to file suit or sit on her rights”).

1 rendered its "should have discovered" provision meaningless.

2 This Court has not yet set forth any bright line rules regarding when there is
3 sufficient evidence to establish, as a matter of law, that a plaintiff has discovered her
4 legal injury. However, as a general matter, this Court has found that
5 determinations regarding statutes of limitation can be made as a matter of law in
6 some instances. See Siragusa v. Brown, 114 Nev. 1384, 1400-1401, 971 P.2d 801,
7 812 (1998) (citing Nevada Power Co. v. Monsanto Co., 955 F.2d 1304, 1307 (9th
8 Cir. 1992)) (stating that, where there is uncontroverted evidence that proves the
9 plaintiff discovered or should have discovered the facts giving rise to a claim under
10 the discovery rule, such a determination can be made as a matter of law).

11 The current trend in Nevada jurisprudence deems plaintiffs to be on inquiry
12 notice, at the latest, when they meet with an attorney for the purpose of potentially
13 pursuing a lawsuit. Like the current trend in Nevada's jurisprudence, California
14 has consistently held that the statute of limitations in medical malpractice actions
15 commences, as a matter of law, once an attorney is consulted. See Dolan v.
16 Borelli, 13 Cal.App.4th 816, 823 (1993) (statute of limitations began to run as a
17 matter of law when the plaintiff consulted her attorney and informed the attorney
18 of her suspicions of wrongdoing); Rose v. J. Kingsley Fife, 207 Cal. App. 3d 760,
19 769-770, n.10 (1989) (plaintiff was suspicious of wrongdoing once she consulted
20 an attorney); Gutierrez v. Massoud Mofid, 39 Cal. 3d 892, 900 (1985) (statue of
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1 limitations is not tolled when an attorney advises that there was no provable
2 malpractice).³

3
4 Based on the foregoing, the District Court manifestly abused its discretion by
5 applying an actual notice standard to deny Petitioners' motion for summary
6 judgment. *See Exhibit 11*. The District Court should have granted Petitioners'
7 motion for summary judgment because Plaintiffs were put on inquiry notice of their
8 possible cause of action by the time they had retained an attorney on July 13, 2005.
9

10 In fact, the District Court agreed that Plaintiffs were on inquiry notice prior
11 to receiving their expert's affidavit. *See Exhibit 10 at 5:9-12*. No facts were
12 discovered between Plaintiffs' first meeting with their initial attorney on July 13,
13 2005 and Plaintiffs' receipt of their expert's initial affidavit on March 12, 2006.
14 *See Dr. Friedman's Expert Report dated March 12, 2006, attached hereto as*
15 *Exhibit 15*. This suggests that the District Court must have found Plaintiffs were
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17
18 ³ California's jurisprudence should be persuasive in this matter since Nevada's
19 medical malpractice tort reform was originally modeled after California's medical
20 malpractice tort reform. *See Ybarra v. State*, 97 Nev. 247, 628 P.2d 297, 297-98
21 (1981) (explaining that a statute adopted from another jurisdiction is presumed to
22 have been adopted with the construction placed upon it by the courts of that
23 jurisdiction before its adoption). *See also Menteberry v. Giacometto*, 51 Nev. 7,
24 267 P. 49, 51 (1928) ("Our statute was evidently taken from the California Code,
25 and is substantially the same [though in different format]....While the construction
26 given [to] the sections by the court of that state is not conclusive, it is very
27 persuasive, and especially so where the construction is reasonable, fair, and just, as
28 in the case mentioned; hence we accept such construction."); *Gilloon v. Humana,*
Inc., 100 Nev. 518, 521 (1984) (explaining that NRS 41A.097 is analogous to
California Code of Civil Procedure section 340.5 and that the legislative history of
NRS 41A.097 indicates that it was based on California Code of Civil Procedure
section 340.5).

1 on inquiry notice when they met with their initial attorney on July 13, 2005 since
2 nothing further was discovered to put Plaintiffs on notice of their possible claims
3 until they received their expert's initial affidavit, which amounted to being put on
4 actual notice. However, the District Court was not sure what the proper standard
5 was for determining when Plaintiffs' statute of limitations began to run; and
6 therefore, the District Court erroneously denied Petitioners' motion for summary
7 judgment on the grounds that there remained a genuine factual issue regarding the
8 timing of Plaintiffs' actual knowledge of negligence (i.e. actual notice). *See*
9 *Exhibit 10 at 2:12-16; September 28, 2011 Hearing Transcript at 6:22 - 7:3,*
10 *attached hereto as Exhibit 16; and Exhibit 11.*

13 **C. Because They Were Put on Inquiry Notice of Their Possible**
14 **Cause of Action By the Time They Retained an Attorney by July**
15 **13, 2005, Plaintiffs' Statute of Limitations Expired on July 13,**
16 **2006, and Therefore, the Complaint Plaintiffs Filed on November**
17 **16, 2006 is Barred Pursuant to NRS 41A.097**

18 A fact intensive analysis of the instant case reveals that Plaintiffs had
19 suspicions of negligence and a causal link to the death of Stephanie Brock prior to
20 November 16, 2005, which amounted to inquiry notice and triggered their statute
21 of limitations. There was no dispute as to any fact that Petitioners presented in
22 support of their motion summary judgment. This is not a situation where the cause
23 of the patient's injury or death was unknown as in the cases of Pope v. Gray and
24 Massey v. Litton. Plaintiffs were advised by a nurse in their family, Jean Walker,
25 at a family meeting that the decedent's autopsy result confirmed her death was
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1 caused by her laparoscopic procedure. *See Exhibit 7 at 20:2-18, 21:11 – 22:2.*
2 *See also Exhibit 3.* Jean Walker explained to her family that the decedent's
3 autopsy report showed that the decedent's death was caused by a perforated bowel
4 and that there was nothing wrong with the decedent's heart. *See Exhibit 7 at*
5 *24:20 – 25:3.* This family meeting resulted in an informed decision to pursue
6 litigation. *See id. 20:20 – 21:5.*

7
8 To explain the underlying rationale for defining "injury" as "legal injury,"
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10 this Court quoted the Utah Supreme Court as follows:

11 While the recipient may be aware of a disability or dysfunction, there
12 may be, to the untutored understanding of the average layman, no
13 apparent connection between the treatment provided by a physician and
14 the injury suffered. Even if there is, it may be passed off as an
15 unavoidable side effect or a side effect that will pass with time. . . .
16 [W]hen injuries are suffered that have been caused by an unknown act
17 of negligence by an expert, the law ought not to be construed to destroy
18 a right of action before a person even becomes aware of the existence of
19 that right.

20 Furthermore, to adopt a construction that encourages a person who
21 experiences an injury, dysfunction or ailment, and has no knowledge of
22 its cause, to file a lawsuit against a health care provider to prevent a
23 statute of limitations from running is not consistent with the unarguably
24 sound proposition that unfounded claims should be strongly
25 discouraged. . . .

26 It would also be imprudent to adopt a rule that might tempt some health
27 care providers to fail to advise patients of mistakes that have been made
28 and even to make efforts to suppress knowledge of such mistakes in the
hope that the running of the statute of limitations would make a valid
cause of action nonactionable.

29 Massey, 99 Nev. at 727 (quoting Foil v. Ballinger, 601 P.2d 144, 147-148 (Utah

1 1979).

2 In the instant matter, by July 13, 2005, Kerry Brock, Sr. had access to the
3 following facts, which would have put a reasonable person on inquiry notice of his
4 possible cause of action: (1) the decedent's autopsy report listed the decedent's
5 cause of death as fibrinous peritonitis due to perforation of the sigmoid colon (*see*
6 *Exhibit 3*); (2) Jean Walker, a retired registered nurse, explained the decedent's
7 autopsy results to Kerry Brock, Sr. and told him that the decedent's death had been
8 caused by her bowel being perforated during her laparoscopic procedure and that
9 there was nothing wrong with the decedent's heart (*see Exhibit 7 at 24:20 – 25:3*);
10 and (3) the decedent was only thirty (30) years-old, did not have any pre-existing
11 heart conditions, and was in relatively good health prior to her laparoscopic
12 procedure (*see Exhibit 6 at 29:15-17, 33:20-23; Exhibit 7 at 17:19-25, 18:17-24;*
13 *and Exhibit 8 at 27:10 – 28:13*).

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17 Kerry Brock, Sr. not only had access to facts that would have put a
18 reasonable person on inquiry notice of his possible cause of action by July 13,
19 2005, he actually inquired about his possible cause of action when he met with an
20 attorney from Hardy Hardy & McNicholas and retained them to pursue his
21 possible cause of action. *See Exhibit 4 and Exhibit 5 at 7:18-22. See also Exhibit*
22 *6 at 34:13-16 and Exhibit 7 at 23:6 – 24:11.* Furthermore, Hardy Hardy &
23 McNicholas actively pursued Plaintiffs' claim until they referred Plaintiffs to their
24 current counsel due to an unspecified conflict of interest. *See Exhibit 4 and Exhibit*
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7 at 22:23 – 23:1, 24:2-7.

Consequently, since Kerry Brock, Sr. had access to facts that would have put a reasonable person on inquiry notice of his possible cause of action by July 13, 2005 and he actually retained a law firm to pursue his possible cause of action by that date as well, Plaintiffs' one-year statute of limitations expired on July 13, 2006. Defendants are therefore entitled to a judgment as a matter of law because Plaintiffs did not file their Complaint until November 16, 2006.

D. New Evidence Further Establishes that Kerry Brock, Sr. had Access to Facts which Would Have Put a Reasonable Person on Inquiry Notice of his Possible Cause of Action by July 13, 2005

Petitioners acknowledge that some of the foregoing information was available to the Nevada Supreme Court when they reversed this Court's order granting Defendants' initial motion to dismiss. However, the recent deposition testimonies of Brenda Bias, Jean Walker, and Ikea Bias have clarified important facts that Plaintiff Kerry Brock, Sr. was unable to recall during his limited deposition on June 4, 2007.

Brenda Bias, the decedent's mother, testified that on June 19, 2005 (the day that the decedent died) she believed the decedent's death had been caused by something that went wrong during the decedent's laparoscopic procedure because she was told that the decedent died from heart failure, but the decedent was not sick before her laparoscopic procedure and she did not have any heart problems. *See Exhibit 6 at 29:15-17, 31:21 – 32:17, 33:20-23.* She also testified that within a few days of the decedent's passing, Kerry Brock, Sr. told her that he also thought the

1 decedent's death had been caused by something that went wrong during the
2 decedent's laparoscopic procedure. *See id. at 34:13 – 35:3.*

3 Jean Walker, the decedent's aunt and retired registered nurse, personally
4 ordered the decedent's autopsy on or before June 21, 2005 because she also thought
5 the decedent's death had been caused by something that went wrong during the
6 decedent's laparoscopic procedure. *See Exhibit 7 at 18:25 – 19:18. See also*
7 *Exhibit 3.* She had questions about the cause of the decedent's death because the
8 decedent was only thirty (30) years-old and did not have any other medical
9 problems so "red flags just went up." *See Exhibit 7 at 17:19-25.* Further, Jean
10 Walker did not believe that the decedent could have suffered a heart attack at age
11 thirty (30) without any other problems. *See id. at 18:17-24.*

12 The decedent's autopsy report listing perforated bowel as her cause of death
13 validated Jean Walker's suspicions that something had happened during the
14 decedent's laparoscopic procedure. *See Exhibit 7 at 19:20 – 20:1.* Jean Walker
15 testified that approximately two weeks after receiving the decedent's autopsy report
16 – which is dated June 21, 2005 – she explained the decedent's autopsy report to her
17 family, including Kerry Brock, Sr., at a family meeting, which Kerry Brock, Sr.
18 attended. *See id. at 20:2-18, 21:11 – 22:2. See also Exhibit 3.* She told her
19 family that the decedent's autopsy report showed that the decedent's death was
20 caused by a perforated bowel and that there was nothing wrong with the decedent's
21 heart. *See Exhibit 7 at 24:20 – 25:3.* Brenda Bias testified that she recalled Jean
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1 Walker telling her the decedent's autopsy results confirmed her cause of death was
2 related to her laparoscopic procedure. *See Exhibit 6 at 38:1-21.*

3 Jean Walker also testified that their family meeting about the decedent's
4 autopsy report resulted in a decision to pursue litigation. *See Exhibit 7 at 20:20 -*
5 *21:5.* Kerry Brock, Sr. told Brenda Bias that he was getting an attorney because he
6 thought something had gone wrong during the surgery that caused the decedent's
7 death. *See Exhibit J at 39:3-19.* Jean Walker's niece-in-law, Michelle Board,
8 went online to look for an attorney and gave Jean Walker the name of the law firm
9 Hardy Hardy & McNicholas sometime before July 13, 2005. *See Exhibit 7 at*
10 *22:22 - 23:5. See also Exhibit 4.*

13 Jean Walker further testified that she went with Kerry Brock, Sr. to Hardy
14 Hardy & McNicholas and they personally met with a female attorney. *See Exhibit*
15 *7 at 23:6 - 24:1.* This meeting took place on or before July 13, 2005. *See Exhibit*
16 *4.* The purpose of this meeting was to pursue a lawsuit based on the decedent's
17 death as it related to her laparoscopic procedure. *See Exhibit 7 at 24:8-11.* Jean
18 Walker testified that the attorneys from Hardy Hardy & McNicholas referred them
19 to Plaintiffs' current counsel due to "some sort of conflict of interest or something."
20 *See id. at 22:23 - 23:1, 24:2-7.*

23 Moreover, Ikea Bias, the decedent's youngest sister, testified that she
24 immediately believed the decedent's death had been caused by something that went
25 wrong during the decedent's laparoscopic procedure because the decedent was fine
26

1 before surgery. *See Exhibit 8 at 26:10 – 27:13.* She knew the decedent was
2 healthy before the surgery because she had been living with the decedent. *See id.*
3 *at 10:16-17.* Specifically, Ikea Bias said that “[i]t was from her surgery, so yeah,
4 common sense, you know” and that she blamed Dr. Silver for the decedent’s death
5 because “she wasn’t like this until after he did this procedure on her.” *See id. at*
6 *27:1-13.*

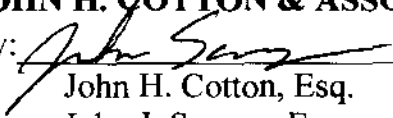
8 Finally, at or around the time of the decedent’s death on June 19, 2005, Kerry
9 Brock, Sr. told Ikea Bias that he believed Dr. Silver’s surgery caused the decedent’s
10 death. *See id. at 27:17 – 29:4, 32:1-8.* At or around the time of the decedent’s
11 autopsy results on June 21, 2005, Kerry Brock, Sr. also told Ikea Bias that the
12 decedent’s autopsy report showed the decedent’s bowel was nipped. *See id. at*
13 *33:1-6.* Ikea Bias believed the decedent’s autopsy results confirmed that Dr.
14 Silver’s surgery caused the decedent’s death. *See id. at 34:3-13.*

17 III. CONCLUSION

18 For the foregoing reasons, Petitioners respectfully request that this Court
19 grant this Petition for Writ of Mandamus and Order the Respondent to grant
20 Petitioners Motion for Summary Judgment and dismiss Plaintiffs’ Complaint.
21

22 Respectfully Submitted this 9th day of February 2012.

24 **JOHN H. COTTON & ASSOCIATES, LTD.**

25 By: 
26 John H. Cotton, Esq.
27 John J. Savage, Esq.
28 Attorneys for Petitioners

CERTIFICATE OF COMPLIANCE AND NRAP 27(e) CERTIFICATE

I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or imposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular N.R.A.P. 28(e) which requires every assertion in the brief regarding matters in the record supported by reference to the page or transcript or appendix where the matter relied upon is found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirement of the Nevada Rules of Appellate Procedure.

Further, I hereby certify that the circumstances of this matter are urgent because on February 7, 2012 trial for this case was reset to begin on April 2, 2012. Petitioners would be forced to expend unwarranted legal fees at trial if this matter was heard in the normal appellate course. On February 9, 2012, I advised an assistant to Plaintiffs' Counsel via telephone that I was filing this Emergency Petition for Writ of Mandamus the same day and that I would have the Emergency Petition hand delivered on February 9, 2012, which it was. The contact information for Plaintiffs' Counsel is: Ralph A. Schwartz, Esq. of the law firm of RALPH A. SCHWARTZ, P.C., 400 S. Fourth Street, Suite 280, Las Vegas, Nevada 89101.

Dated this 9th day of February 2012.


By: 

John J. Savage, Esq.

Attorney for Petitioners

RECEIPT OF COPY

A RECEIPT OF COPY of the foregoing **PETITIONER'S EMERGENCY WRIT OF MANDAMUS; MEMORANDUM OF POINTS AND AUTHORITIES; SUPPORTING EXHIBITS** is hereby acknowledged this 9th day of February, 2012.

By: 


Ralph A. Schwartz, Esq.
Ralph A. Schwartz, P.C.
400 S. Fourth St., Ste. 280
Las Vegas, Nevada 89101
Attorney for Plaintiffs

CERTIFICATE OF MAILING

I hereby certify that on this 9th day of February 2012, I served the foregoing
**PETITIONER'S EMERGENCY WRIT OF MANDAMUS; MEMORANDUM
OF POINTS AND AUTHORITIES; SUPPORTING EXHIBITS** upon the
following parties by placing a true and correct copy thereof in the United States
Mail at Las Vegas, Nevada with first class postage fully prepaid thereon as follows:

The Honorable Kathy Hardcastle
The Eighth Judicial District Court
Regional Justice Center
200 Lewis Avenue
Las Vegas, Nevada 89101
Respondent

Catherine Cortez Masto
Attorney General
Nevada Department of Justice
100 North Carson Street
Carson City, Nevada 89701
Counsel for Respondent


An Employee of John H. Cotton and Associates, Ltd.